SUPREME COURT, U. S.

FILED

DEC 17 1973

MICHAEL RODAK, JR., CLERK

73-935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

ELMO DEAN DRESSEL,
ROBERT EUGENE HUGHES,
SIDNEY SCHWARTZ,
and CHARLES J. SMITH,
Petitioners,
versus
UNITED STATES OF AMERICA

CONSOLIDATED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

For Petitioners Dressel
and Hughes
Charles H. Sandhouse
Post Office Box 1631
Sterling, Colorado 80751

For Petitioners Schwartz
and Smith
SHERMAN & SHERMAN, P. C.
Edward H. Sherman and
Harris D. Sherman
1130 Capitol Life Center
Denver, Colorado 80203

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA
OCTOBER TERM, 1973

ELMO DEAN DRESSEL,
ROBERT EUGENE HUGHES,
SIDNEY SCHWARTZ,
and CHARLES J. SMITH,
Petitioners,
versus
UNITED STATES OF AMERICA

CONSOLIDATED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners hereinabove-named, by their respective attorneys, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on October 15, 1973, a petition for rehearing being denied on November 16, 1973. The judgment of conviction by the United States District Court for the District of Colorado was entered January 23, 1973, and the Defendant Dressel was sentenced to five years, the Defendant Hughes to four years, the Defendant Schwartz to three years, and the Defendant Smith to two and one-half years. Each of the Defendants was also fined.

Petitioners who seek to review their several cases on certiorari have consolidated their petitions herein for they involve identical or closely related questions, and accordingly they file a single petition for writ of certiorari covering their cases.

OPINION BELOW

The Opinion of the United States Court of Appeals entered on or about October 15, 1973, has to petitioners'

knowledge not yet been officially reported and is printed in the Appendix hereto.

JURISDICTION

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is invoked under 28 U.S.C. Sec. 1254(1), also Rule 19(b) of the Supreme Court Rules. Cases believed to sustain the jurisdiction are *U.S. v. Behrens,* Ind. 1963, 84 S.Ct. 295, 375 U.S. 162, 11 L.Ed2d 224. *Downum v. U.S.,* Tex. 1963, 83 S.Ct. 1033, 372 U.S. 734, 10 L.Ed.2d 100. *Rex Trailer Co. v. U.S.,* Ind. 1956, 76 S.Ct. 219, 350 U.S. 148, 100 L.Ed. 149.

QUESTIONS PRESENTED FOR REVIEW

The questions presented by the Petition for Writ of Certiorari are as follows:

1. Is an indictment which charges:

> "On or about the 18th day of March, 1972, in the State and District of Colorado, ELMO DEAN DRESSEL, ROBERT EUGENE HUGHES, SIDNEY SCHWARTZ and CHARLES J. SMITH, also known as Carl J. Smith, knowingly did have in their possession goods of a value in excess of One Hundred Dollars ($100.00), that is, 40,000 pounds of swinging beef, which had been embezzled and stolen while the said goods were moving as, were a part of, and constituted an interstate shipment of freight and express from Fort Morgan, Colorado, to Richmond, California, ELMO DEAN DRESSEL, ROBERT EUGENE HUGHES, SIDNEY SCHWARTZ and CHARLES J. SMITH, also known as Carl J. Smith, then knowing said goods to have been embezzled and stolen in violation of Title 18, United States Code, Section 659"

sufficient under 18 U.S.C.A. 659 where it does not include a specific allegation of the place or facility from which the goods were taken nor include an allegation as to ownership of the goods?

2. Which of the Circuit Court of Appeals of the United States are correct in their interpretation of 18 U.S.C.A. 659 as to the necessity, or lack thereof, for an indictment under such statute to set forth that the goods allegedly taken were taken from one of the places or facilities specifically enumerated in the statute?

3. Was the evidence of the prosecution, the truck rental receipt, Exhibit 4, properly admitted into evidence where there was no foundation laid for offering such exhibit?

4. Does Rule 7(c) Federal Rules of Criminal Procedure eliminate the requirement that an indictment under 18 U.S.C.A. 659 must include a specific allegation of the place or facility from which the goods were taken and the allegation of the ownership of the goods?

5. Were the Petitioners or any of them denied due process of law because their conviction was based upon insufficient evidence?

STATUTES INVOLVED

The statute upon which the indictment was based is 18 U.S.C. Sec. 659, and relevant to one of the issues is Rule 7(c), Federal Rules of Criminal Procedure.

CONCISE STATEMENT OF THE CASE

The defendants were indicted under Title 18, United States Code, Section 659 as follows:

"On or about the 18th day of March, 1972, in the

State and District of Colorado, ELMO DEAN DRESSEL, ROBERT EUGENE HUGHES, SIDNEY SCHWARTZ and CHARLES J. SMITH, also known as Carl J. Smith, knowingly did have in their possession goods of a value in excess on one hundred dollars ($100.00), that is, 40,000 pounds of swinging beef, which had been embezzled and stolen while the said goods were moving as, were a part of, and constituted an interstate shipment of freight and express from Fort Morgan, Colorado, to Richmond, California, ELMO DEAN DRESSEL, ROBERT EUGENE HUGHES, SIDNEY SCHWARTZ and CHARLES J. SMITH, also known as Carl J. Smith, then knowing said goods to have been embezzled and stolen, in violation of Title 18, United States Code, Section 659."

There was an additional count in the indictment charging defendants Dressel and Hughes alone with theft, which count was not incorporated in the above count and was dismissed before submission to the jury.

Duane Osborne, a convicted felon imprisoned at the time of trial and his admitted confederate Schlund, both of whom testified that they had been granted immunity from prosecution in exchange for their testimony, recited that they had participated in the theft of the beef and the trailer in which it was loaded and were at the ranch of Osborne where the beef was reloaded onto other trucks while Schlund was disassembling the truck under Osborne's directions.

Osborne testified that Hughes and Dressel contacted him while he was at a motel with Smith and Asmus because he and Hughes had some meat which they had to dispose of. The load of meat was at Osborne's ranch. They wanted to contact Smith who had related that Schwartz could fence the meat for them. Schwartz was

allegedly phoned and later drove to the ranch where the meat was inspected and a price agreed upon. He testified that later Schwartz rented a refrigerated truck, and they returned to the ranch and the meat was loaded into the truck.

They accused Defendants Hughes and Dressel of being at the scene and helping in the unloading and reloading process.

Osborne further testified that he visited Sidney Schwartz, who conducted a business under the name of Diamond Meat Company (R. T. page 24, line 18) this business was located on 12th Street, between Larimer and Market.

No other witness attempted to connect this defendant with the alleged transaction.

Testimony from three witnesses, Frank W. Myers, Harold Croswell and Elnore Phillips, related only to the loading of beef belonging to American Beef Packers, Inc. onto a trailer from which it was later missing. Their testimony and Exhibit B disclosed that there was no such legal entity as American Beef Packing Transport Company, the alleged owner in Count I of the Indictment.

Lamar Warren was called as a government witness.

He testified he was a rental agent for a truck rental company (R. T. lines 21 and 22, page 106).

He then testified:

Q At this time I show you what has been marked for identification as Plaintiff's Exhibit 4 and I ask you if you can identify that document.

A Yes, sir, that's a copy of a rental contract that I prepared.

Q And how can you determine whether or not you prepared that?

A It has my initials down at the bottom of the contract, sir.

Q And what date was that prepared?

A That was prepared 3-18-72.

Q And for what kind of vehicle was it prepared?

A For a 1969 I believe it is Ford 16-foot refrigerated van.

Q And who was the one that rented that particular vehicle?

A Schwartz Meat Companies.

Q And who signed for it?

A Sid Schwartz.

MR. HALABY: At this time, I would move for the introduction of Plaintiff's Exhibit 4.

THE COURT: Show it to counsel.

MR. HALABY: Yes.

VOIR DIRE EXAMINATION

BY MR. ROSSMAN:

Q Mr. Warren, can you identify the person who entered into this contract with you?

A In this courtroom, sir?

Q Yes.

A No, sir, not conclusively. Not definitely.

Q Have you ever entered into any other contract with the same individual for the rental of trucks?

A Not to my knowledge, no, sir.

Q What is your capacity at that place of business?

A It was a rental agency.

Q You just rent the trucks?

A Rented the truck, yes, sir.

Q Were you present when it was returned?

A No, sir, I was not.

MR. ROSSMAN: I have no further questions on voir dire, Your Honor.

THE COURT: All right, any objection to the reception in evidence of the exhibit?

MR. ROSSMAN: On behlaf of the defendant Schwartz we would object on the ground that there has been no identification made with the name Schwartz as it appears and as related to the defendant in this action.

MR. SANDHOUSE: If it please the Court, we would object to the introduction of Plaintiff's Exhibit 4 in that there has been no proper foundation laid, that it has not been tied to anyone who is on trial today, and for the further reason it has no bearing on Count 1 of the indictment.

THE COURT: The exhibit is received. The objections are overruled. It is received only as to Count 2 of the indictment, ladies.

(Plaintiff's Exhibit 4 for identification was received in evidence.)

Exhibit 4 reflects the rental was to "Swartz Meat Co." of 175 Grape, Denver, Colorado.

Harold Asmus, a government witness, testified that two people that he didn't recognize in the courtroom had been in a motel room with Osborne, Smith and himself. (lines R. T. 13 to 15, page 74)

This witness, on cross examination, stated and reiterated he had never talked to anyone relative to this matter. (R. T. lines 7 to 11, page 79)

On impeachment by the government, he admitted the falsity of this testimony (R. T. lines 3 and 4, page 80) and that he had given a statement concerning the matter. Exhibit D.

The testimony of the remaining government witness, Donald W. Lyon, Jr., was limited to the location of the truck.

The government then rested.
Motions for acquittal were denied.

ARGUMENT

I.

THE INDICTMENT FAILS TO ALLEGE THAT THE GOODS WERE TAKEN FROM ONE OF THE SPECIFICALLY ENUMERATED PLACES OR FACILITIES REFERRED TO IN TITLE 18, UNITED STATES CODE, SECTION 659.

The indictment fails to allege that the goods were taken from one of the specifically enumerated places or facilities referred to in Title 18, United States Code, Section 659.

The fact that a count of an indictment does not charge a crime shall be noticed by the Court at any time. *Federal*

Rules of Criminal Procedure, Rules 12(b) (2) and 52 (b).

Title 18, United States Code, Section 659, provides:

"Interstate or foreign shipments by carrier; State prosecutions

"Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight express or other property; or

"Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; . . . "

Under this statute relating to theft of the goods from interstate commerce it is not a federal crime to steal goods from interstate shipment of freight unless goods are taken from one of the specifically enumerated places or facilities.

The United States Court of Appeals for the Third Circuit had the precise question before it in *United States of America vs. Alfred Manuszak,* 234 F. 2d 421:

"(1) One of appellant's contentions is that count 1 of the indictment should be quashed because it does not charge a crime. Although the alleged defect was not brought to the attention of the district court, it can properly be raised in this court, for such defect shall be noticed at any time. Fed. Rules Crim. Proc. Rule 12(b) (2), Rule

54(a) (1), 18 U.S.C.; Johnson v. United States, 9 Cir., 1953, 206 F. 2d 806, 808; United States v. Amorosa, 3 Cir., 1948, 167 F. 2d 596, 598. Specifically, it is said that count 1, although charging a theft of interstate goods, does not contain any charge as to the specific place or facility from which the goods were taken; accordingly, an essential element of the crime is lacking, which circumstance renders the indictment invalid.

"We think appellant's contention is a good one . . .

"(2) Under this statute, it is not a federal crime to steal goods from an interstate shipment of freight unless the goods are taken from one of the specifically enumerated places or facilities. Other thefts, although of goods which are part of an interstate shipment, are not federal crimes. That being so, an indictment which only charges a theft of goods from an interstate shipment of freight without alleging that the goods were taken from one of the specifically enumerated places or facilities does not charge all the essential ingredients of a crime so far as the federal government is concerned. Wolkoff v. United States 6 Cir., 1936, 84 F. 2d 17; United States v. Cohen, 3 Cir., 1921, 274 F. 596; United States v. McCulloch, D. C. Ind. 1947, 6 F.R.D. 559.

• • •

"(3, 4) Nowhere in the language of count 1 can allegations be found specifying the place or facility from which the goods were taken. For this reason the count is a nullity as a charge of a federal crime and should be quashed. The defect is not one of form which will be overlooked after a verdict when no prejudice is shown . . . "

To the same effect are the cases of *United States* v. *McCulloch,* 6 F.R.D. 559.

The requirement that the indictment set forth by taking from one of the specifically enumerated places or

facilities is not of recent origin, but is a continuation of a long line of cases following the rule layed down in *United States vs. Moynihan,* 258 F. 529, decided July 7, 1919, and *United States vs. Cohen,* 274 F. 596, decided July 15, 1921.

It is apparent that Congress was aware of these decisions when it broadened the locations covered by the section on October 14, 1966.

If the Congressional intent had been to simply prohibit the taking from any interstate shipment, that intent could easily have been embodied in a statute that did not specifically enumerate the places and facilities.

The instant case differs from the line of cases following *United States v. Wora,* 246 F. 2d 283, where no attack on the indictment was made in the Trial Court as the sufficiency of the indictment was challenged at the trial.

II.

WHERE NO FOUNDATION IS LAID FOR OFFERING A WRITTEN EXHIBIT BY THE PROSECUTION, WHICH EXHIBIT WAS THE ONLY DOCUMENT THAT PURPORTED TO CORROBORATE THE GOVERNMENT'S PRINCIPAL WITNESS, WHO AVOWEDLY WAS GRANTED IMMUNITY, THE ADMISSION OF SUCH EXHIBIT WAS PREJUDICIAL.

Exhibit 4 was the *only document* that purported to corroborate the witness Osborne. Osborne's testimony was prejudicial and most untrustworthy.

The admission of this document was prejudicial as the jury was allowed to conjecture that it was signed by one of the defendants.

Similarity of names to one of the defendants should not be enough basis to admit an otherwise completely extraneous document.

"*Sid Schwartz*" is not the name of any of the defendants nor was "*Swartz* Meat Co" used by any of the defendants.

The witness Warren who identified the exhibit could not identify any of the defendants as the individual who rented the truck (page 108 line 7 of the transcript).

It is a well established rule that as a preliminary to the introduction in evidence of private writings their execution must be proved and their authenticity established by extrinsic proof.

In People v. Manganaro 218 NY9, 112 NE 436 the appellate court in discussing the admissibility of the writing in question said:

> "It was not admissible unless and until sufficient evidence had been presented, either direct or circumstantial, to legitimately satisfy (the trial judge) that the defendant was its author. It is a fundamental rule that, in general, all private writings must be proved to be genuine before they are admissible in evidence. The genuineness may be proved by indirect or circumstantial evidence the same as many other facts; but the circumstantial evidence in the present case, and as a general rule, must be of such a force and character that defendant's authorship of the writing can be legitimately deduced from it. It must, with reasonable and natural certainty and precision, compel the conclusion that defendant wrote the document, and exclude the conclusion that it was the product of another. It must force or induce the mind to pass beyond a suspicion or conjecture that the defendant was the author. Suspicion is not proof, nor conjecture

evidence, upon which courts can act in determining the rights of parties. The writing was not found in the possession of the defendant. The evidence does not prove when or how or by whom it was placed upon the dresser. Neither the fact that the name of the defendant was written at its end, nor the fact that it was found in the room which the defendant had occupied, created the presumption that he was its author. The proof did not authenticate it and its admission in evidence was error."

See also annotation in 131 A.L.R. 301.

III.

THAT THE REQUIREMENT THAT AN INDICTMENT UNDER 18 USCA 659 MUST INCLUDE A SPECIFIC ALLEGATION OF THE PLACE OR FACILITY FROM WHICH THE GOODS WERE STOLEN AND THE OWNERSHIP OF THE GOODS HAS NOT BEEN CHANGED BY RULE 7(c) FEDERAL RULES OF CRIMINAL PROCEDURE

The possession of stolen property is not a federal crime.

Only possession of property constituting an interstate shipment that has been stolen from specifically enumerated places or facilities is prohibited by statute.

18 USCA 659 enumerates with particularity places and facilities from which it is a federal crime to take property.

To attribute to Congress an intent to prohibit possession of property allegedly stolen from any place or facility ignores the history of the legislation and the uniform judicial interpretation of such statute covering a period from 1919 to the present time.

When the statute was last amended and reenacted in 1969 there was no attempt to use broad terms but the particularity was further defined. By using such specific language, as contrasted to the general or broad language of other federal statutes, the Congressional intent is clear.

As essential fact to be proven in an offense charged under 18 USCA 659 is the place or facility from which the property was taken.

If it is essential to a conviction to prove a fact to sustain a conviction it should be, and has until now, been essential to allege such fact in the indictment.

Rule 7(c) Federal Rules of Criminal Procedure has not changed such requirement as it provides:

> "The indictment . . . shall be a plain, concise and definite written statement of the *essential facts* constituting the offense charged."

As there is *no* provision in the Federal Rules of Criminal Procedure that gives the accused the *right* to a bill of particulars and since an *indictment* cannot be amended except by the grand jury the indictment must state all the essential ingredients of the crime.

The indictment does not state a crime and its sufficiency was challenged in the trial court.

The distinction between the long line of cases from United States v. Moynihan, 258 F. 529 decided July 7, 1919, and United States v. Cohen 274 F. 596 decided July 15, 1921, to United States v. Alfred Manusyak 234 F. 2d. 421 and United States v. Wora 246 F. 2d. 283 is not that the indictment was faulty but only whether the matter could be raised for the first time in the appellate court.

IV.

PETITIONERS' CONVICTION WAS BASED UPON INSUFFICIENT EVIDENCE AND WAS A DENIAL OF DUE PROCESS.

The record will show that the evidence was not sufficient to convict the Defendants. It was based solely upon the uncorroborated evidence of an avowed felon who had been granted immunity and who was clearly prejudiced. Petitioner Schwartz was never identified sufficiently to implicate him. As for Petitioner Smith, there was not such a *nexus* or relationship between him and the goods to treat the extent of his dominion and control as if it were actual possession. Nor did he have constructive possession. A conviction based on this record violates due process of law.

BASIS FOR FEDERAL JURISDICTION

The basis for federal jurisdiction in the United States District Court in and for the District of Colorado is predicated upon a purported violation of 18 U.S.C. 659.

BASIS FOR THIS APPLICATION FOR WRIT OF CERTIORARI

We respectfully submit that there are special and significant reasons for granting this petition:

1. The United States Courts of Appeal have apparently differed upon the application of the doctrine of *United States* v. *Manuszak* for the proposition that an indictment must allege all of the essential elements of a crime including the specific places or facilities from which goods are taken. This raises questions of such substance and significance as to require determination by this Honorable Court. Our contention is that the matters omitted from the indictment involve *essential facts* constituting the offense charged. They are not matters of form but of

substance. Accordingly, because of the apparent differences of the Courts of Appeal, such a conflict should be adjudicated with finality since it involves due process of law.

2. Additionally, this issue of federal law is important enough to be settled by this Honorable Court.

3. The issues we have raised here we respectfully submit call for adjudication and at the least the exercise of this Court's power of supervision.

The conviction and sentences imposed in this case are of the profoundest significance to the petitioners themselves but even more involve the determination of issues and the affirmance of principles that go far beyond the plight of these petitioners.

Respectfully submitted,

SHERMAN & SHERMAN, P.C.

By Edward H. Sherman

Harris D. Sherman
Attorneys for Petitioners
Schwartz and Smith
1130 Capitol Life Center
Denver, Colorado 80203

Charles H. Sandhouse

Attorney for Petitioners

Dressel and Hughes
Post Office Box 1631
Sterling, Colorado 80751

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM - 1973

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Nos. 73-1230
	)	73-1231
ELMO DEAN DRESSEL,	)	73-1232
ROBERT EUGENE HUGHES,	)	73-1233
SIDNEY SCHWARTZ,	)	
CHARLES J. SMITH,	)	
	)	
Defendants-Appellants.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 72-CR-343)

Theodore S. Halaby, Assistant U. S. Attorney, Denver, Colorado (James L. Treece, U. S. Attorney, Denver, Colorado, on the Brief) for Appellee.

Charles H. Sandhouse, Sterling, Colorado, for Elmo Dean Dressel and Robert Eugene Hughes, Appellants.

Melvin Rossman, Denver, Colorado (Edward Sherman, Denver, Colorado, on the Brief) for Sidney Schwartz, Appellant.

Michael F. Morrissey, Denver, Colorado (Edward H. Sherman, Denver, Colorado, on the Brief) for Charles J. Smith, Appellant.

Before BREITENSTEIN, BARRETT and DOYLE, Circuit Judges.

BARRETT, Circuit Judge.

This consolidated appeal is from jury convictions of possessing goods in violation of 18 U.S.C.A. 659. [1] Appellants were all similarly charged in a two count indictment handed down by the Grand Jury. Count I was dismissed by the trial court. Count II, under which the jury found all of the appellants guilty, charged as follows:

> On or about the 18th day of March, 1972, in the State and District of Colorado, ELMO DEAN DRESSEL, ROBERT EUGENE HUGHES, SIDNEY SCHWARTZ and CHARLES J. SMITH, also known as Carl J. Smith, knowingly did have in their possession goods of a value in excess of one hundred dollars ($100.00), that is, 40,000 pounds of swinging beef, which had been embezzled and stolen while the said goods were moving as, were a part of, and constituted an interstate shipment of freight and express from Fort Morgan, Colorado, to Richmond, California, ELMO DEAN DRESSEL, ROBERT EUGENE HUGHES, SIDNEY SCHWARTZ and CHARLES J. SMITH, also known as Carl J. Smith, then knowing said goods to have been embezzled and stolen in violation of Title 18, United States Code, Section 659.

1/ Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express or other property; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or . . .

Seven witnesses testified for the prosecution, including Frank Myers, General Manager of the American Beef Packers Transportation Company; Harold Croswell, Office Manager, American Beef Packers, Fort Morgan, Colorado division; Elmore Phillips, formerly a driver for American Beef Packers, Fort Morgan, Colorado; Francis Osborne, a convicted felon who was afforded immunity for testifying; Harold Asmus, a companion of Osborne's; Donald Schlund, a mechanic; and Donald Lyon, a special agent with the F.B.I.

Myers testified that on March 17, 1972, a tractor-trailer operated by American Beef Packers Transportation Company, a division of American Beef Packers, loaded with a shipment of meat which was being shipped from Fort Morgan, Colorado, to Richmond, California, disappeared. Myers testified that the meat was in the custody of American Beef Packers Transportation Company and that it was never recovered. Croswell testified that there were 40,186 pounds of beef in the shipment valued at $22,762.47. Phillips testified that he discovered that the tractor-trailer was missing on the morning of March 18, 1972.

The chief witness for the Government was Francis Osborne. He testified that Hughes and Dressel first approached him in January of 1972 and inquired if he could sell a load of meat for them and that he subsequently introduced them to Smith who related that Schwartz could "fence" the meat for them. Osborne stated that Dressel contacted him again on the evening of March 17, 1972, while he was at a motel with Smith and Asmus. Dressel then indicated that he needed to contact Smith and have him contact Schwartz because he and Hughes had some meat and had to do something with it. Osborne further testified that he and Smith went to Osborne's

ranch the morning of March 18, 1972, after Dressel told Osborne that the load of meat was at his ranch.

Osborne further stated that after he and Smith went to the ranch, they returned to their motel room in Sterling, Colorado, where Smith phoned Schwartz and told him that they had a load of beef; that Schwartz then joined them at the motel; and that they all drove to the ranch where they inspected the meat and agreed on the price and payment for the beef. Osborne testified that Schwartz and Dressel then went to Denver, where Schwartz rented a refrigerated truck, and that Dressel thereafter returned to the ranch where he and Hughes loaded some meat into the truck. Dressel then drove back to Denver.

Osborne also stated that the remainder of the meat was transported to Denver; that the truck-tractor was dismantled by Hughes, Schlund and himself, and subsequently delivered to the Broda property in Commerce City; and that he received cash and checks from Schwartz at his place of business for the meat. Osborne further related the manner in which the cash and checks were distributed between Dressel, Hughes, Smith, and himself.

The other witnesses for the Government offered testimony of a corroborative nature. Asmus testified that he was with Osborne and Smith at a Sterling motel on March 17, 1972. Schlund testified that he helped Osborne dismantle a truck-tractor at Osborne's ranch, and that while at the ranch he observed Hughes and Dressel unloading meat from a truck. Lyon testified that the American Beef Packers Transportation Company truck-tractor parts were recovered on the Broda property in Commerce City.

On appeal the appellants set forth four primary allegations of error, i.e.: (1) Court II was insufficiently pled;

(2) there was a material variance between the indictment and the evidence introduced at the trial; (3) Exhibits 1, 4 and 5A were improperly admitted; and (4) the trial court erred in allowing the testimony of Asmus.

I.

Appellants contend that Count II was not sufficiently pled because it fails to allege that the goods were taken from one of the specifically enumerated places or facilities designated in 18 U.S.C.A. 659 and because it fails to allege ownership of the goods.

In support of this contention appellants cite the Third Circuit of United States v. Manuszak, 234 F.2d 421 (3rd Cir. 1956), United States v. Cohen, 274 F. 596 (3rd Cir. 1921), and United States v. Moynihan, 258 F. 529 (3rd Cir. 1919), for the proposition that an indictment must allege all of the essential elements of a crime, including the specific places or facilities from which goods are taken. Appellants also cite United States v. McCulloch, 6 F.R.D. 559 (N.D.Ind. 1947), for the proposition that ownership of the goods must be alleged. We hold that Count II was sufficiently pled to state the essential elements of the crime set forth under 18 U.S.C.A. § 659, *supra.*

The test of the sufficiency of an indictment is not whether it could have been more definite, but whether it contains all of the elements of the offense and whether the defendant was apprised of what he had to be prepared to meet. Russell v. United States, 369 U.S. 749 (1962); Adams v. United States, 375 F.2d 635 (10th Cir. 1967). We recently reiterated our position on the sufficiency of indictments in Robbins v. United States, 476 F.2d 26 (10th Cir. 1973), wherein we noted:

> Rule 7(c), F.R. Cr.P., has put an end to "rules of technical and formalized pleading." Russell v.

United States, 369 U.S. 749, 762, 82 S.Ct. 1038, 1046, 8 L.Ed.2d 240. Imperfections of form that are not prejudicial are disregarded and common sense prevails over technicalities. The sufficiency of indictments must be determined on the basis of practical rather than technical considerations and the validity of attacks on them must be considered from a broad and enlightened standpoint of right reason rather than from a narrow view of technicality and hairsplitting.
476 F.2d at 30.

Although Count II did not state the specific place from which the goods were taken, or the ownership of the goods, this did not invalidate it when, as here, Count II was only part of a two-count indictment, and the appellants were convicted of *possessing,* rather than stealing goods moving in interstate commerce. Nothing in the record or in appellants' briefs shows that they were prejudiced because of the manner in which Count II was pled.

II.

Apellants allege that there was a material variance between the indictment and the evidence introduced at the trial. This contention is predicated on the fact that whereas ownership of the beef in Count I is alleged to be ownership by "American Beef Packing Transportation Company", the evidence as offered and received established that the meat was owned by American Beef Packers, Inc. Although Count I was dismissed before it was considered by the jury, thereby rendering this particular allegation of error moot, we nevertheless hold that there was no material variance between the indictment and the evidence offered. The evidence clarly established that American Beef Packers Transportation Company was a division of American Beef Packers, Inc. and that

the meat was in the custody of American Beef Packers Transportation Company. Since the admissibility of evidence is discretionary with the trial court, we will not set aside its decision unless it is clearly erroneous. United States v. Brumley, 466 F.2d 911 (10th Cir. 1972); United States v. Acree, 466 F.2d 1114 (10th Cir. 1972), cert. denied 410 U.S. 913 (1973).

III.

Appellants contend that Exhibits 1, 4, and 5A were improperly admitted and that Harold Asmus should not have been allowed to testify. Exhibit I was a shipping order for the beef in question which stated that the shipment contained 40,168 pounds of fresh beef and that it was to be shipped from Fort Morgan, Colorado to Richmond, California. Exhibit 5A was a manifest showing the weight and quantity of beef being shipped. Exhibit 4 was a copy of a rental contract for a refrigerated truck which indicated that a truck was rented on March 18, 1972 to "Schwartz Meat Company" and that it was received by a person who signed the name of "Sid Schwartz".

As noted above, the admissibility of evidence is discretionary with the trial court. United States v. Brumley, *supra*. This is particularly true in instances such as these in which the evidence complained of is of a corroborative nature. The appellants have failed to show that they were prejudiced by its admission. We hold that the exhibits were properly admitted.

This rationale is equally applicable to the testimony of Asmus. Although it is true that there was a variance in the dates he testified to and those set forth in his statement, he was subject to cross-examination by the appellants. There is no showing of prejudice. We hold that the testimony of Asmus was properly admitted.

We have reviewed the entire record. The balance of the contentions raised by appellants have no merit. In view of the overwhelming evidence of guilt, the alleged errors, if present, were harmless. Kotteakos v. United States, 328 U.S. 750 (1946); United States v. Quinones-Gonzalez, 452 F.2d 964 (10th Cir. 1971).

AFFIRMED.

NOVEMBER TERM — NOVEMBER 16, 1973

Before Honorable Jean S. Breitenstein, Senior Circuit Judge, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Nos. 73-1230
	)	73-1231
ELMO DEAL DRESSEL,	)	73-1232
ROBERT EUGENE HUGHES,	)	73-1233
SIDNEY SCHWARTZ and	)	
CHARLES J. SMITH,	)	
	)	
Defendants-Appellants.	)	

This matter comes on for consideration of the petitions for rehearing filed by the appellants in the above cases.

Upon consideration whereof, the petitions for rehearing are denied.

HOWARD K. PHILLIPS,
Clerk

LIBRARY
SUPREME COURT, U. S.

No. 73-935

Supreme Court, U. S.
FILED
FEB 28 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

ELMO DEAN DRESSEL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-935

ELMO DEAN DRESSEL, ET AL., PETITIONERS

v.

UNITED States UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners raise issues concerning the sufficiency of the indictment, the admissibility of an exhibit, and the sufficiency of the evidence to sustain their convictions.

After a jury trial in the United States District Court for the District of Colorado, petitioners were convicted of possessing property worth more than $100 that had been stolen from interstate commerce, in violation of 18 U.S.C. 659. Sentences of imprisonment were imposed as follows: Dressel, five years; Hughes, four years; Schwartz, three years; and Smith, two and a half years. Fines in varying amounts were also imposed on each petitioner. The court of appeals affirmed (Pet. App.).

The facts of the case are set out in the opinion of the court of appeals, which also answers petitioners'

claims, and we rely on that opinion in opposing certiorari.[1] We note that there is a conflict between the instant case and the cases cited by petitioners on the issue of the necessity for specifying in an indictment charging an offense under 18 U.S.C. 659 the particular interstate commerce facility from which the goods were stolen, but we believe this not to be an issue of sufficient general importance to merit review by this Court. Moreover, the recent cases have all agreed with the court of appeals' position here, and this Court has previously declined to review this conflict. *United States* v. *Spivey*, 448 F. 2d 390 (C.A. 4), certiorari denied, 405 U.S. 927; *Dunson* v. *United States*, 404 F. 2d 447 (C.A. 9), certiorari denied, 393 U.S. 1111; *United States* v. *Prujansky*, 415 F. 2d 1045 (C.A. 6); *United States* v. *Wora*, 246 F. 2d 283 (C.A. 2); *United States* v. *Hampton*, 341 F. Supp. 481 (E.D. Wis.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

---

[1]Petitioners' claim that the evidence was insufficient is raised here for the first time and need not be considered by this Court. *Lawn* v. *United States*, 355 U.S. 339, 362. In any event, the evidence, as shown in the court of appeals' opinion (Pet. App. 3A-4A), was ample to support the convictions.